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No. 518

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATHAN L. POSNER, ESQUIRE, and S. JEROME EPSTEIN, Executors for the Estate of ABRAHAM EPSTEIN, DECEASED, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General.

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OPINIONS BELOW

The opinions of the United States District Court for the Eastern District of Pennsylvania (App. 118a-125a, 126a-130a)[1] are not reported. The opinion of the Court of Appeals (Pet. 11-16), is reported at 269 F. 2d 742.

[1] "App." refers to the printed appendix filed in the court below in Number 12,752.

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 1959 (Pet. 17). The petition for a writ of certiorari was filed on November 6, 1959.

QUESTIONS PRESENTED

1. Whether the involvement of petitioners' decedent in the fraudulent scheme proved by the Government was such as to make him amenable to the remedy provided in § 26(b)(2) of the Surplus Property Act (recovery by the United States of twice the consideration which passed).

2. Whether an action under §26 of the Surplus Property Act survives the death of the defendant by virtue of 28 U.S.C. 2404 (providing for the survival of any "civil action for damages commenced by or on behalf of the United States").

STATUTES INVOLVED

1. Section 26 of the Surplus Property Act of 1944, 58 Stat. 780, 50 U.S.C. App. (1946 ed.) 1635, now codified as Section 209 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 392, 40 U.S.C. 489, provides in pertinent part:

> (b) Every person who shall use or engage in, or cause to be used or engaged in, or enter into an agreement, combination, or conspiracy to use or engage in or to cause to be used or engaged in, any fraudulent trick, scheme, or device, for the purpose of securing or obtaining, or aiding to secure or obtain, for any person any pay-

ment, property, or other benefits from the United States or any Federal agency in connection with the procurement, transfer or disposition of property hereunder—

(1) shall pay to the United States the sum of $2,000 for each such act, and double the amount of any damage which the United States may have sustained by reason thereof, together with the cost of suit; or

(2) shall, if the United States shall so elect, pay to the United States, as liquidated damages, a sum equal to twice the consideration agreed to be given by the United States or any Federal agency to such person or by such person to the United States or any Federal agency, as the case may be: or

(3) shall, if the United States shall so elect, restore to the United States the money or property thus secured and obtained and the United States shall retain as liquidated damages any property, money, or other consideration given to the United States or any Federal agency for such money or property, as the case may be.

* * * *

(d) The civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law.

2. 28 U.S.C. 2404 provides:

A civil action for damages commenced by or on behalf of the United States or in which it is interested shall not abate on the death of a defendant but shall survive and be enforceable against his estate as well as against surviving defendants.

STATEMENT

The United States instituted this action against petitioners' decedent, Abraham Epstein, under §26 of the Surplus Property Act of 1944, *supra*, claiming that Epstein had fraudulently used the veterans' preference certificate of one of his employees, Jack Grollman, to purchase surplus property from the War Assets Administration. As its "civil remedy", the United States, in accord with the language of §26(b)(2) of the Act, elected to recover twice the consideration involved in the fraudulent transactions. (Pet. 12). Epstein died before a trial could be held, and petitioners, the executors of his estate, were substituted (App. 2a). After trial, the District Court found that Epstein had violated the Act with respect to purchases totaling $7,922.23 (App. 129a, 118a, 118½a) and entered judgment for twice that amount, *i.e.*, $15,844.46 (App. 130a). The Court of Appeals affirmed (Pet. 11-16).

ARGUMENT

1. Petitioners contend that even though the decedent's fraudulent purchases came within §26(b) of the Surplus Property Act, *supra*, pp. 2-3, the United States may not recover damages under the second election of remedies provided in §26(b)(2) (*i.e.*, twice the consideration involved in the fraudulent purchases). The claim is made that, in this case, the United States may only elect a remedy under §26(b)(1) or 26(b)(3).

The first part of §26(b) describes the persons to be held liable in terms of the conduct §26 is intended

to reach. It provides liability for "(e)very person" who engages in or conspires to engage in a false scheme to obtain "for any person" property disposed of by the Government under the Surplus Property Act. The latter part of § 26(b) provides, in three subsections, three remedies, one of which the United States may elect as compensation for injury sustained as a result of the frauds covered in the first part of § 26(b). Thus, the latter part of § 26(b) specifies that persons committing such frauds shall (1) "pay to the United States * * * $2,000 for each such act" and "double the amount of any damage which the United States may have sustained by reason thereof" (§ 26(b)(1)); or (2) "if the United States shall so elect, pay to the United States, as liquidated damages, * * * twice the consideration agreed to be given by the United States * * * to such person or by such person to the United States" (§ 26(b)(2)); or (3) "if the United States shall so elect, restore to the United States the money or property thus * * * obtained and the United States shall retain as liquidated damages any * * * consideration given to the United States" (§ 26(b)(3)).

Petitioners argue that § 26(b)(2) affords the United States a remedy only against one who actually agreed to give the consideration involved in the fraudulent scheme forbidden by the Act, but not against other participants in the scheme. Under

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[2] Section 26(d) provides that the "civil remedies provided in this section shall be in addition to all other criminal penalties and civil remedies provided by law."

this interpretation, even though the defendant has committed a fraud forbidden by § 26(b), if another participant in the fraud was the person who actually transmitted or received the consideration involved, the Government may not elect the second remedy afforded it by the Act. In attempting to apply this argument here, petitioners assert that the veteran Grollman was the only person who actually paid the consideration to the Government. Hence, they argue, the decedent, Epstein, the person sought to be held liable, could not be subject to damages under § 26(b)(2). To this, there are two answers.

(*a*). Congress, in specifying the election of remedies in § 26(b), intended to insure that the Government would be adequately compensated for injury to the surplus property program in the event that such property was fraudulently obtained by persons who did not qualify under the program. *Rex-Trailer Co. v. United States*, 350 U.S. 148. A rule that the United States may not elect the remedy afforded by 26(b)(2) simply because some person other than the defendant, perhaps even an innocent person, was the one who transmitted or received the consideration, is plainly at odds with this purpose. Petitioners argue (Pet. 7) that, "[w]hatever may have been the legislative intent," their position is supported by "the plain language of the subsection." We disagree. The words "such person" in § 26(b)(2), as the court below ruled, apparently refer to the nearest preceding use of the term "person", that is, "any person"

for whom property is fraudulently obtained in the fraudulent scheme described in the first part of § 26(b). (Pet. 14.)

(*b*). But, in any event, petitioners' argument could not produce a different result in this case. As the Court of Appeals noted (Pet. 13, 14), Grollman was merely Epstein's agent for the purchase of the surplus property involved. Thus, Epstein was actually the "person" from whom the consideration passed to the Government, albeit Grollman was the intermediary. Accordingly, even if the petitioners' theory had merit, the Court of Appeals could not have applied it here.[3]

2. Petitioners also argue (Pet. 8-9) that this action "is quasi-criminal" and therefore abated at Epstein's death (Pet. 15). 28 U.S.C. 2404, *supra*, p. 3, provides, however, that "[a] civil action for damages commenced by * * * the United States * * * shall

[3] Petitioners seem to admit the inapplicability of their argument to this case when they assert "Whether or not the Court of Appeals could or would have supported its conclusion on a theory of agency (in the absence of supporting evidence) its actual holding is based upon the erroneous interpretation of the subsection quoted above." (Pet. 7.) It is quite clear, contrary to this assertion, that the Court of Appeals rested its decision on the alternative ground that petitioners' argument is not applicable to the facts of this case. The portion of the Third Circuit's opinion quoted by the petitioners (Pet. 6-7) is immediately followed by the sentence (Pet. 14):

"Even if we should be wrong in this analysis we would still have no difficulty in supporting the conclusion that it was Epstein through his agent Grollman who, within the meaning of the statute, received the property in suit from the government and resold it at a profit to Regal."

not abate on the death of a defendant but shall survive and be enforceable against his estate * * *." And this Court, in *Rex Trailer Co.* v. *United States*, 350 U.S. 148, 151-152, has held: "In §26 of the Surplus Property Act, Congress has provided three alternative remedies. * * * All three were recognized as civil remedies by Congress before the bill was passed, and the conclusion is inescapable that each was of the same nature and designed to serve the same purpose." The view that these remedies are not penal was reaffirmed only last Term in *Koller* v. *United States*, 359 U.S. 309.[1]

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[1] Petitioners also suggest that "clear and convincing evidence" is not enough to sustain a finding of fraud in a civil action, and contend that the "stricter rule" requiring proof "beyond a reasonable doubt" should have been applied by the court below (Pet. 7). Petitioners' insistence on proof "beyond a reasonable doubt" in large part stems from the discredited view that the action is criminal in nature. The test urged by petitioners has never been applied in civil fraud cases. See, *e.g.*, *Helvering* v. *Mitchell*, 303 U.S. 391; *United States* v. *American Bell Telephone Co.*, 167 U.S. 224; *Lalone* v. *United States*, 164 U.S. 255; *Jones* v. *Simpson*, 116 U.S. 609. See also *Daniel* v. *United States*, 234 F. 2d 102 (C.A. 5); *Murray & Sorchson, Inc.* v. *United States*, 207 F. 2d 119 (C.A. 1); 9 Wigmore, *Evidence*, § 2498 (3d ed., 1940).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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